appropriately in the courtroom throughout all of the pretrial hearings. The trial court acknowledged:

> I should go on and indicate that so far during any court proceedings, there have been absolutely no problems with Mr. Finch's behavior, and that included a brief period of testimony of Thelma Finch.

1RP 1148.[2]

Further, Mr. Finch had no history of any violence while incarcerated in the past, he had never attempted to escape from custody, and he had never shown any hostility toward law enforcement officers or correctional officers while incarcerated. It is true that Mr. Finch had a 1970 conviction for burglary, a 1976 conviction for vehicular homicide (manslaughter), and a 1979 conviction for rape. Yet, Mr. Finch had had no further convictions in the intervening 15 years, and since his release from prison in 1986, he had functioned in society with no indication of violence or criminal conduct.

Nevertheless, the trial court granted the state's request, ordering that Mr. Finch's legs be shackled throughout the entire trial, and that Mr. Finch's leg shackles be handcuffed to the table leg and that one of his arms handcuffed to the chair arm during Thelma's trial testimony. The extent of the trial court's analysis was the following:

> I certainly have concerns that the jury not be presented with a heavily shackled defendant. I think that causes problems in terms of fairness of the trial. But I can see here that Mr. Finch is a large man, he's a strong man, and this courtroom is small enough that the reaction time of any custodial officer would be such that it could be difficult to restrain him in a quick period of time.

1RP 1148.[3]

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[2] The transcripts are designated as follows: the multi-volumed, consecutively-numbered pretrial hearings are designated "1RP"; the multi-volumed, consecutively-numbered trial transcripts are designated "RP."

[3] Mr. Finch filed a pre-trial motion to limit the number of uniformed, armed officers that could be present in the audience of the courtroom at any one time. The trial court denied this motion in

The only accommodation discussed by the trial court were the placement of a skirt around the table to hide the existence of leg shackles from the jury and the movement of Mr. Finch in and out of the courtroom out of the presence of the jury:

> I think we can structure a skirting system for the tables and make sure that Mr. Finch is moved in and out of the courtroom outside the presence of the jury so that leg shackles could be employed to minimize the risk to everyone and there would be no particular problems or issues apparent to the jury.
>
> I'm more concerned with arm restraints because it's tough to make them not visible. In the general course of the trial, I'm going to—in fact I'm going to require that Mr. Finch have both arms free when the jury is present . . . .
>
> . . . I would authorize the Department of Corrections to use not only the leg restraints but to secure them to the table, if they believe that's necessary, and to secure Mr. Finch's arm—one arm, leaving his left arm, his writing arm free during [Thelma's] testimony.
>
> I've not heard anything in particular with respect to Ms. Elizares that causes the same concerns and I wouldn't have any special rulings with respect to her testimony.

1RP 1149-50. The trial court, however, did not discuss whether all of the state's safety concerns could be addressed through means other than shackles and handcuffs.

The trial court decided that the first day of voir dire was going to be held in an auditorium known as the Ginni Stevens Hearing Room in order to accommodate the large number of prospective jurors on the jury panel. The attorneys for both parties and the corrections officers in charge of transporting Mr. Finch to and from court went to the Ginni Stevens Hearing Room, took pictures of the layout of that room, and reported back to the trial court on the logistics of using the auditorium for the first day of voir dire. The prosecutor reported to the trial court that from his conversations with the jailers, he understood that Mr. Finch would be hobbled as he

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part and allowed up to five armed officers to be present in the audience during the trial. 1RP 1238-1244.

entered the room in front of the jurors and that, as a result, there would be some difference in his gait. After examining the pictures and hearing from the corrections officers, the trial court found that it was inevitable that the jury would see the shackles as Mr. Finch entered:

> I should just indicate that in terms of what the jury may or may not see, the jury may well be able to see that there's some restraining going on and I don't think there's any way of avoiding that.

RP 1271. The trial court did not indicate why Mr. Finch could not have been brought in and out of the room outside of the presence of the jury.

On April 27, 1995, after the jury panel had seen Mr. Finch entering the Ginni Stevens Hearing Room in shackles, defense counsel asked that the skirting around counsel table in the smaller trial courtroom be removed. Defense counsel indicated that after discussion with Mr. Finch, they had concluded that the skirting was counterproductive even though it screened Mr. Finch's shackles from the jurors. The trial court asked Mr. Finch if he agreed with this request and he indicated that he did. The trial court granted the motion and removed the skirting from the counsel table.

During trial, before the jury began its deliberations, the trial court notified the parties that a juror had raised safety concerns to the bailiff:

> THE COURT: I came out without the jury because the bailiff reported something to me which I asked him to relay to both sides. Apparently it involved the expressions of some anxiety by Juror Alternate Number 2, Ms. Loeckher, who, as I understand it, expressed some concern that when Deputy Chief Slack was testifying and was up at the board, that he was backed up against the counsel table and his gun was within the reach of the defendant, or so she thought it was, at least. She expressed some concern in that regard.

RP 2085.

In response to Mr. Finch's motion for a new trial, the trial court stated that the shackling was justified by the fact that an easel used by the state during trial was in close proximity to Mr. Finch. RP 2707. Although the state had not raised the issue of the location of the easel and

the state witnesses in relation to Mr. Finch as a reason for shackling Mr. Finch, the trial court used this fact as a *post hoc* justification for handcuffing Mr. Finch at trial.

C. 1998 Evidentiary Hearing.

Because the state claimed that the record was unclear whether the jury could detect that Mr. Finch was physically restrained on the first day of voir dire, in spite of the trial court's finding that they could, the Washington Supreme Court remanded for an evidentiary hearing on the issue of whether it was possible for the jury to know that Mr. Finch was restrained when entering, leaving or sitting in the auditorium.

At the April 1998 evidentiary hearing, the officers who transported Mr. Finch into the Ginni Stevens Hearing Room testified that as he entered the auditorium, Mr. Finch had to negotiate steps on his way to his chair. Several witnesses testified that Mr. Finch's gait was abnormally slow. Mr. Finch's trial counsel testified that Mr. Finch's movements were noticeably restricted by the restraints, and that he walked with an unusual shuffling walk or stunted stride. The prosecutor submitted photographs of a detective descending the stairs wearing shackles to establish that the seated jury pool could not actually see them. The defense, however, submitted photographs demonstrating that the restraints were, in fact, visible. An expert ergonomist testified for the defense that the restraints reduced Mr. Finch's stride and step length by 28 to 35 percent.

The trial court, nevertheless, found that it was not possible for the jury to see Mr. Finch's shackles when he entered the auditorium. The trial court also found that it was not possible for the jury to know that Mr. Finch was restrained based on restrictions in his movements. The court acknowledged that Mr. Finch's movements were restricted and that his stride was shortened by the placement of the restraints on his ankles. It also conceded that it was possible for the jury to

notice that Mr. Finch was walking slowly and with short strides. But, the court stated, this could have occurred because of "the solemnity of the occasion." As a result, the trial court found that while the jurors could have speculated that Mr. Finch was restrained, there was no way they could have actually "known" that he was shackled. Although not asked to do so, the trial court made an extended statement about its responsibility for security in the courtroom.[4] *But see State v. Finch*, 137 Wn.2d at 856-857 ("The trial court's conclusions, however, were based on conflicting findings which proved both confusing and beyond the scope of this court's order).

D. Washington Supreme Court Decision

The Washington Supreme Court affirmed Mr. Finch's convictions but reversed his death sentences and remanded the case for a new sentencing hearing. The supreme court's decision was based on the fact that the trial court had erred in ordering Mr. Finch to be shackled and handcuffed during both the guilt and the penalty phases of his trial. All nine justices agreed that the trial court erred in failing to make the mandatory *individualized* assessment necessary before requiring a defendant to appear before the jury in shackles. Six justices agreed that the error was **not** harmless with respect to the penalty phase, given the subjective nature of the issues presented to the jury on sentencing and the importance of the jurors' consideration of future dangerousness. Two of the six justices, however, would have gone further and reversed both the conviction and the death sentences, because the evidence of premeditation and aggravating factors was less than overwhelming. The remaining three justices felt that the shackling of Mr. Finch was harmless in both the guilt and penalty phases.

[4] This statement was quoted by the state in its petition at pp. 6-8.

VI. ARGUMENT

A. State and federal courts consistently require a determination by the trial court that shackles are necessary in light of some indication that the defendant may be an escape risk, a danger to others or to himself, or disruptive in court; this determination is made on a case-by-case basis with consideration of the least restrictive alternative.

The Washington Supreme Court's reversal of Mr. Finch's death sentences was based on the unique factual circumstances presented in that case and did not involve a ruling of federal law in conflict with any decision of this Court, any federal appellate courts, or any state supreme court.

1. There is no conflict in federal or state law as to the legal standard that applies to a trial court's decision to shackle a defendant during his trial.

a. The right to be free from shackles during trial.

The state argues that the *Finch* decision creates a conflict in federal and state law as to the legal standard that applies to a trial court's decision to shackle a defendant during his trial. This argument should be rejected because the *Finch* case is quite consistent with all case law on this point. It is well settled that except in extraordinary circumstances, a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed.2d 353 (1970). Requiring a person to appear in court in shackles, in the absence of these extraordinary circumstances, constitutes a violation of the right to due process and a fair trial under the Fourteenth Amendment. *See Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed.2d 525 (1986); *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed.2d 126 (1976).

This fundamental legal principle has been followed by the majority of federal and state courts that have addressed the issue. *See Rohden v. Roland*, 172 F.3d 633 (9th Cir. 1999); *Duckett v. Godinez*, 67 F.3d 734, 747 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158, 116 S. Ct.

1549, 134 L. Ed.2d 651 (1996), *aff'd after remand*, 109 F.3d 533, *cert. denied*, 66 USLW 3257, 118 S. Ct. 135, 139 L. Ed.2d 84 (1997); *Marquez v. Collins*, 11 F.3d 1241, 1243 (5th Cir.), *cert. denied sub nom., Marquez v. Scott*, 513 U.S. 881, 115 S. Ct. 215, 130 L. Ed.2d 143 (1994); *Gilmore v. Armontrout*, 861 F.2d 1061, 1071 (8th Cir. 1988), *cert. denied*, 490 U.S. 1114, 109 S. Ct. 3176, 104 L. Ed.2d 1037 (1989); *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987), *cert. denied*, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed.2d 715 (1988); *Brewster v. Bordenkircher*, 745 F.2d 913, 917 (4th Cir. 1984); *Kennedy v. Cardwell*, 487 F.2d 101, 111 (6th Cir. 1973), *cert. denied*, 416 U.S. 959, 94 S. Ct. 1976, 40 L. Ed.2d 310 (1974); *Elvik v. State*, 114 Nev. 883, 965 P.2d 281, 283 (1998); *State v. Bennett*, 281 Ill.App.3d 814, 666 N.E.2d 899, 906, *appeal dismissed*, 671 N.E.2d 735 (1996); *State ex rel. Juvenile Department of Multnomah County v. Millican*, 138 Ore. App. 142, 906 P.2d 857, 859 (1995), *review denied*, 913 P.2d 1384 (1996); *People v. Jackson*, 14 Cal. App.4th 1818, 18 Cal. Rptr.2d 586, 588, *review denied* (1993); *State v. Young*, 853 P.2d 327, 350 (Utah 1993); *State v. Morgan*, 84 Ohio App.3d 229, 231, 616 N.E.2d 941, 943 (1992), *appeal dismissed*, 611 N.E.2d 835 (1993); *Commonwealth of Pennsylvania v. Jasper*, 531 Pa. 1, 610 A.2d 949, 955 (1992); *State v. Thompson*, 832 S.W.2d 577, 579 (Tenn. Crim. App. 1991); *Stockton v. Commonwealth of Virginia*, 402 S.E.2d 196, 200 (Va.), *cert. denied*, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed.2d 231 (1991); *Hunt v. State*, 583 A.2d 218, 228 (Md. 1990), *cert. denied*, 502 U.S. 835, 112 S. Ct. 117, 116 L. Ed.2d 86 (1991); *State v. Tolley*, 226 S.E.2d 353, 366 (N.C. 1976); *State v. Borman*, 529 S.W.2d 192, 195 (Mo. App. 1975); *Thompson v. State*, 514 S.W.2d 275, 278 (Tex. Crim. App. 1974); *Commonwealth v. Brown*, 364 Mass. 471, 305 N.E.2d 830, 834 (1973); *People v. Thomas*, 1 Mich. App. 118, 134 N.W.2d 352 (1965); *Sparkman v. State*, 27 Wis.2d 92, 133 N.W.2d 776, 779 (1965); *State v.*

Roberts, 86 N.J. Super. 159, 206 A.2d 200, 205 (1965); *French v. State*, 377 P.2d 501, 504 (Okla. Crim. App. 1962).

In Washington state, the federal constitutional violation also constitutes a violation of Article 1, sections 3 and 22 of the Washington State Constitution. In *State v. Hartzog*, 96 Wn.2d 383, 635 P.2d 694 (1981), the supreme court stated:

> Section 22, art. 1, of our constitution, declares: "In criminal prosecutions the accused shall have the right to appear and defend in person." The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty.

96 Wn.2d at 398, *quoting State v. Williams*, 18 Wash. 47, 51, 50 P. 580 (1897). Other state courts have similarly held that the right to be free of restraints in the absence of extraordinary circumstances is a right guaranteed by state constitutional law. *See, e.g., State v. Roberts, supra.*

b. Exceptional circumstances establishing a manifest need to restrain a defendant.

The federal and state courts are also unanimous on the factual circumstances that would support an order to restrain a criminal defendant: (1) facts indicating a need to prevent an accused's escape; (2) facts indicating a need to prevent the accused from resorting to violence, directed at injuring himself or others; and (3) facts indicating a need to prevent the accused from disrupting judicial proceedings. *See Finch*, 137 Wn.2d at 846, and the plethora of cases cited in fn.12.

c. Procedure for trial court's determination of need.

Upon a showing by the state of a manifest need to shackle a criminal defendant, a trial court has the discretion to do so as long as (1) the court, and not law enforcement personnel, has determined that there are facts to support the claimed need; (2) the record shows the reasons for such restraints; and (3) the defendant was provided an opportunity to object and to present

reasons why restraints were unnecessary. *See Elledge v. Dugger*, 823 F.2d at 1452 (state must make showing that shackling is necessary to further an essential state interest); *State v. Kessler*, 57 Or. App. 469, 474, 645 P.2d 1070, 1072 (1982) (court reversed conviction based on trial court's failure to articulate factual basis for decision to shackle defendant); *State v. Shoen*, 578 N.W.2d 708, 713 (Minn. 1998) (after court has made a record justifying its decision to shackle a defendant, he must be given opportunity to challenge court's reasoning).

d. Evidence or factors for trial court to consider.

Trial courts may in the course of their analysis consider many factors, including the seriousness of the charge, the defendant's character and temperament, his age and physical attributes, his past record, past escapes or attempted escapes, threats to harm others, self-destructive tendencies, the risk of mob violence, possibility of rescue by other offenders at large, the size and mood of the audience, the nature and physical security of the courtroom, and the adequacy and availability of alternative remedies. *Finch*, 137 Wn.2d at 848; *Tolley*, 226 S.E.2d at 368; *Brown*, 305 N.E.2d at 836. These factors, however, should be considered probative only if they demonstrate a risk of escape, violence in the courtroom, or a disruption of the judicial proceedings. *Finch*, 137 Wn.2d at 849.

The fact that a criminal defendant has been accused of a violent crime is not, by itself, sufficient to demonstrate that the accused will engage in violence in the courtroom. *See People v. Boose*, 66 Ill.2d 261, 362 N.E.2d 303, 306 (1977) (court erred in shackling defendant based solely on fact that he had been charged with murdering guard while in prison); *People v. Duran*, 16 Cal.3d 282, 545 P.2d 1322, 127 Cal. Rptr. 618, 625 (1976) (fact that state inmate had been charged with violent crime did not, without more, justify the use of physical restraints); *Coates v. State*, 487 N.E.2d 167, 170 (Ind. App. 1985) (confrontational arrest is not of itself basis for

physical restraints at trial); *Shoen*, 578 N.W.2d at 715 (rejecting per se rule for persons charged with first degree murder).

e. Less restrictive alternatives to shackles.

If a trial court determines that a defendant poses an imminent risk of escape, that the defendant intends to harm someone in the courtroom, or that he cannot behave in an orderly manner in the courtroom, the court must determine whether physical restraints are necessary or whether there are less restrictive alternatives available. *Duckett*, 67 F.2d at 748 (9th Cir.) ; *Elledge*, 823 F.2d at 1451; *Kennedy*, 487 F.2d at 111. These cases rest on this Court's clear statement that the use of handcuffs, shackles, and other forms of physical restraint should be used only as measures of "last resort." *Allen*, 397 U.S. at 344.

f. Abuse of discretion.

If a trial court orders that a defendant be restrained during a criminal trial without making a factual finding, on the record, sufficient to establish a compelling or manifest need to do so and without evaluating the availability of less restrictive alternatives, the trial court has abused its discretion. *Finch*, 137 Wn.2d at 850; *State v. Reid*, 114 Ariz. 16, 559 P.2d 136, 142 (1976), *cert. denied*, 431 U.S. 921, 97 S. Ct. 2191, 53 L. Ed.2d 234 (1977) (trial court abused discretion by failing to state compelling reason on the record for decision to shackle defendant); *Duran*, 127 Cal. Rptr. at 623 (imposition of physical restraints in absence of record showing need will be deemed to constitute an abuse of discretion); *Willocks v. State*, 546 S.W.2d 819, 822 (Tenn. Crim. 1976) (trial court abused discretion in restraining defendant when less drastic security means would have sufficed).

2. The standard applied by the Washington Supreme Court is consistent with the decisions of this Court, federal appellate courts, and other state supreme courts.

The state argues that the standard applied by the Washington Supreme Court conflicts with the standards established by four state supreme courts, North Carolina, Virginia, Illinois and Massachusetts, and by the Eighth Circuit. This argument should be rejected, because the only distinguishing factor between *Finch* and the cases cited by the state are the underlying factual circumstances and not the legal standards used to resolve the shackling issue.

The state cites to *Tolley* for the proposition that in North Carolina, courts have been given broader discretion to order restraints than is now granted by the Washington Supreme Court. This is a misreading of both *Tolley* and *Finch*. In *Tolley*, the defendant was convicted of two counts of second degree rape. During the trial, the court ordered that the defendant be shackled because he had attempted to escape and the sheriff had requested shackles to prevent another escape attempt. Neither the defendant nor his counsel objected to the shackling. On appeal, Tolley argued that shackling violated his right to due process under the federal and state constitutions. The North Carolina Supreme Court held that the trial court did not abuse its discretion by shackling the defendant, because the trial court had indicated on the record that the reason for shackling the defendant was the past escape attempt, a fact that supported the shackling order.

The *Tolley* court specifically stated:

> [T]he rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom, or to maintain order during trial.

226 S.E.2d at 367, *citing Kennedy*, *supra*, and *Brown*, *supra*. Contrary to the implication in the state's petition, this standard is identical to the test set out by the *Finch* court. Moreover, the

cases on which the North Carolina Supreme Court relied are the same cases cited by the Washington Supreme Court. *See* 137 Wn.2d at 843. In fact, the *Finch* court discussed the *Tolley* case extensively, 137 Wn.2d at 847-849, and did not indicate an intent to establish a standard more restrictive than the test used in *Tolley*. There is no conflict between the *Tolley* case and the *Finch* holding.

The state also asserts that the *Finch* case is in conflict with the holdings of the Virginia Supreme Court in *Stockton*, 402 S.E.2d at 200, the Illinois Supreme Court in *Boose*, 362 N.E.2d at 305-06, and the Massachusetts Supreme Court in *Brown*, 305 N.E.2d at 836. Again, the *Finch* court cited to both the *Boose* and *Brown* cases with approval, *see* 137 Wn.2d at 847 and 849. In *Boose*, the court found that the trial court had abused its discretion in resting its decision to shackle the defendant on the fact that he had been accused of murdering a guard while in prison:

> [W]e cannot say that ...it...is enough to sustain this court's ruling. ... If the shackling here were judged defensible it would seem all persons accused of violent crimes could be shackled in the jury's presence solely because of the character of the crimes charged.

362 N.E.2d at 306. This statement was quoted with approval in *Finch*, 137 Wn.2d at 849.

In *Brown*, the trial court was faced with charges against two state inmates based on their alleged assault and battery of a correctional officer in the course of a prison riot, 305 N.E.2d at 831. The defendants on trial had histories of escape attempts. Because of the nature of the crime, the jury was well aware of defendants' status as prison inmates. Finally, the trial court cautioned the jury against bias on account of the extra security measures taken during trial. These facts, the *Brown* court held, were sufficient to support the trial court's restraint order and to minimize any impact the act had on the jury. *Brown* does not conflict with *Finch*.

There is no indication in *Stockton* that the test applied was any different than that applied by the Washington Supreme Court. In that case, the defendant had engaged in recent violent

crimes, he had a history of escaping from custody, and had cursed at, and made disparaging remarks to, the judge when questioned about his attendance in shackles at trial. The defendant was removed from the courtroom before voir dire had begun based on this disruptive behavior, and was allowed to return two days later, unshackled. Thus, there is no indication in *Stockton* that the defendant was present in the courtroom in shackles at the same time as the jury.

Finally, the state argues that the *Finch* decision conflicts with the Eighth Circuit's holding in *Gilmore v. Armontrout*, 861 F.2d at 1071. In that federal habeas case, Gilmore, who was convicted of murder and sentenced to death, argued that his Fifth Amendment rights had been violated when he was forced to wear leg irons at trial. The Eighth Circuit held that the trial court had not abused its discretion in ordering Gilmore shackled during trial, because he had been previously convicted of murder and had been charged with several additional capital murders. Moreover, the trial court ensured that Gilmore's legs were under counsel table and that the jury at no time was able to observe the restraints. The trial court allowed Gilmore to take the stand outside the presence of the jury, and Gilmore had not objected to the shackles during trial. It is clear that the reason the outcome in *Gilmore* was different than the outcome in *Finch* is because the facts were very different.

There is no conflict in the case law concerning what facts are necessary to justify the physical restraint of a defendant during a criminal trial. The cases, even those cited by the state, are consistent—there must be evidence in the record that leads a trial court to conclude that there is a need to prevent escape, to prevent violence against people in the courtroom, or to control disruptive behavior during the judicial proceedings. While the outcomes of the cases cited by the state may be different, these disparities are explained by the factual records of each. For this reason, the state's petition for a writ of certiorari should be denied.

B. The Washington Supreme Court's harmless error analysis is consistent with federal case law and the case law from other state courts.

The state asserts that the *Finch* court held that the improper use of restraints in a capital sentencing proceeding can never constitute harmless error. From this mischaracterization of the *Finch* decision, the state argues that there is a conflict between Washington on the one hand, and Florida and Maryland on the other hand. The purported conflict is illusory and does not justify the requested writ of certiorari.

1. The state erroneously asserts that the *Finch* court refused to apply the harmless error standard to this case.

The *Finch* court explicitly held that a claim of unconstitutional shackling is subject to a harmless error analysis. 137 Wn.2d at 861. The court held that the trial court erred in shackling and handcuffing Mr. Finch to his chair under the circumstances of this case, and that the error was not harmless during the penalty phase of the trial. This ruling was based on several key facts. First, it was possible for the jury to determine that Mr. Finch was in restraints when he entered the auditorium on the first day of voir dire. Second, Mr. Finch was in leg restraints, visible to the jury, during the entire trial and not just for a brief moment. Finally, Mr. Finch's arm was handcuffed to his chair during the testimony of two witnesses, precluding him from rising when the court was brought into session.

Under RCW 10.95.070(8), one of the statutory factors the jury may consider when deciding to impose the death penalty is whether there is a likelihood that the defendant will pose a danger to others in the future. At issue in *Finch* was the possible impact that shackling may have had on the jury's sentencing decision, particularly in connection with the question of future dangerousness. The supreme court correctly held that the presence of Mr. Finch in physical restraints indicated to the jury that his character was dangerous and thereby prejudiced him. As a

result, the court could not say that the error was harmless beyond a reasonable doubt and that the error deprived Mr. Finch of his right to present mitigating evidence.

2. The sentencing phase cases cited by the state are not inconsistent with the *Finch* ruling.

The state claims that the Washington decision is inconsistent with decisions of Maryland and Florida. This is simply not true.

In *Hunt v. State*, 321 Md. 387, 583 A.2d 218 (Md. 1990), *cert. denied*, 502 U.S. 835, 112 S. Ct. 1117, 116 L. Ed.2d 86 (1991), the Maryland case cited by the state, the court held that the trial court did not abuse its discretion in shackling a defendant during the penalty phase of his trial because he was an escape risk. He had fled the state after the murder and had feigned illness in prison as a way of escaping. He also had demonstrated an inability to adjust to prison life, reflected by several prison rules violations and his resultant continuous confinement to segregated quarters. He was cited twice for possession of weapons. Thus, the court held that the risk of escape and the need for some physical restraint outweighed the potential prejudice to the defendant. The *Hunt* case does not discuss the harmless error standard, because the court did not find that any error had occurred.

Additionally, in *Hunt*, the court applied the same rule of law set forth in *Finch*:

> There are three essential state interests that may justify physically restraining a defendant: Preventing the defendant's escape, protecting those in the courtroom, and maintaining order in the courtroom. Unless one or more of these factors outweigh any prejudice to the defendant, physical restraint is inappropriate.

Hunt, 583 A.2d at 229.

Moreover, in *Lovell v. State*, 347 Md. 623, 702 A.2d 261 (Md. 1997), a post-*Hunt* decision, the Maryland Supreme Court explained in great detail how its analysis of shackling is consistent with the holdings in the majority of state and federal cases. In *Lovell*, the issue was whether the trial court had erred in requiring the defendant to appear in shackles before the jury

during the sentencing phase of his capital trial. The court held that the trial court had erred in shackling Lovell during his capital sentencing hearing, because it had failed to perform an individualized evaluation of the need for the physical restraints. *Id.* at 272. The court cited to six state cases in which shackling during the penalty phase was found to be justified. In each of those cases, however, the defendants had either escaped from custody in the past, were on trial for escape charges, or had disrupted trial court proceedings. This, again, is entirely consistent with the holding in *Finch*.

The state also relies on *Hunt* for the proposition that shackling a defendant during the penalty phase of a capital trial is not sufficiently prejudicial to overturn a death sentence when the defendant has been convicted of a violent crime, such as capital murder.[5] In *Lovell*, the court recognized, however, that prejudice can arise from shackling a defendant during the sentencing phase of a capital case. 702 A.2d at 269. As the court stated:

> One of the mitigating factors to be considered by the jury in a capital sentencing is that "[i]t is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society." Art. 27, § 413(g)(7). Presenting the defendant in shackles before a sentencing jury impacts adversely on the defendant, particularly as to the possibility of the jury's finding the quoted mitigating circumstance.

Id. Thus, the Maryland court's reasoning on the issue of prejudice is identical to the majority opinion in *Finch*.

The Florida case on which the state relies is *Elledge v. State*, 408 So.2d 1021 (Fla. 1981), *cert. denied*, 459 U.S. 981, 103 S. Ct. 316, 74 L. Ed.2d 293 (1982), the state case preceding *Elledge v. Dugger*, *supra*. In the state case, the supreme court held that the trial court did not

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[5] Mr. Finch agrees with the dissenting opinion of Justices Sanders and Johnson that his shackling was overwhelmingly prejudicial during the guilt phase of his trial because of the effect it had on the presumption of innocence. 137 Wn.2d at 868-872. To the extent that the *Hunt* court would have found the prejudice during Mr. Finch's guilt phase to be great, requiring a reversal of the convictions, we agree.

abuse its discretion in shackling the defendant during his penalty phase trial, because he had threatened to attack the judge's bailiff. 408 So.2d at 1023. The Eleventh Circuit reversed the death sentence on the ground that the trial court had refused to provide Elledge with an opportunity to challenge the untested information that served as the basis for the shackling. 823 F.2d at 1451.

Neither the *Hunt* case nor the *Elledge* case presents a conflict in case law on an important question of federal law.

C. The Washington Supreme Court's decision is based on independent state law grounds.

In the *Finch* decision, the Washington Supreme Court relied on Article 1, sections 3 and 22 of the Washington State Constitution, as well as the Sixth and Fourteenth Amendments, in holding that Mr. Finch should not have been shackled during his trial. *See Finch*, 137 Wn.2d at 843. The state constitutional provisions and state cases based on state constitutional protections were expressly cited by the *Finch* court. 137 Wn.2d at 843-866.

If a state court decision rests on an adequate and independent state ground, this Court should not exercise jurisdiction over the case. *See Michigan v. Long*, 463 U.S. 1032, 1037, 103 S. Ct. 3469, 77 L. Ed.2d 1201 (1983); *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed.2d 347, 353 (1996). Jurisdiction is appropriate only if a state decision rests on federal law and the adequacy and independence of any possible state law ground is not clear from the face of the opinion.

In this case, while the *Finch* court cites to federal case law, it clearly rests its decision on independent state constitutional provisions, as well as federal constitutional law, applicable to criminal proceedings. Thus, there is an adequate and independent state ground for the *Finch* decision. This provides an additional basis for denying the petition for a writ of certiorari.

VII. CONCLUSION

Respondent Charles B. Finch respectfully requests that the petition of the State of Washington for a writ of certiorari be denied.

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